Supreme Court, U.S.
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No. 94-768

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DONALD L. CLEVELAND and CHRISTA A. CLEVELAND,
Petitioners,

v.

BELTMAN NORTH AMERICAN CO., INC. and
NORTH AMERICAN VAN LINES,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals properly held that the Carmack Amendment to the Interstate Commerce Act of 1887 precludes an award of punitive damages under a shipper's federal common law claim for breach of the implied covenant of good faith and fair dealing.

LIST OF PARTIES AND RULE 29.1 LIST

The parties to this action are Donald L. Cleveland and Christa A. Cleveland, Petitioners; and Beltman North American Co., Inc. and North American Van Lines, Respondents. The list of affiliates required by Supreme Court Rule 29.1 can be found in the attached Appendix.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 29.1 LIST	i
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS WHY THE PETITION SHOULD BE DENIED	4
CONCLUSION	11

TABLE OF AUTHORITIES

CASES — Page

A.T. Clayton & Co. v. *Missouri-Kan.-Tex. R.R.*, 901 F.2d 833 (10th Cir. 1990) 6
Adams Express Co. v. *Croninger*, 226 U.S. 491 (1913) 7, 9, 10
Chandler v. *Aero Mayflower Transit Co.*, 374 F.2d 129 (4th Cir. 1967) 4
Drucker v. *O'Brien's Moving & Storage Inc.*, 745 F. Supp. 616 (D. Nev. 1990) 6
Erie R.R. v. *Tompkins*, 304 U.S. 64 (1938) 9
Hubbard v. *Allied Van Lines, Inc.*, 540 F.2d 1224 (4th Cir. 1976) 4, 5
Litvak Meat Co. v. *Baker*, 446 F.2d 329 (10th Cir. 1971) 5, 6
Middlesex County Sewerage Auth. v. *National Sea Clammers Ass'n*, 453 U.S. 1 (1981) 8
Miller v. *AAACON Auto Transp., Inc.*, 447 F. Supp. 1201 (S.D. Fla. 1978) 7
Milwaukee v. *Illinois and Mich.*, 451 U.S. 304 (1981) 8
Missouri, Kan. & Tex. Ry. v. *Harris*, 234 U.S. 412 (1914) 7, 8
New York, Phila. & Norfolk R.R. v. *Peninsula Produce Exch.*, 240 U.S. 34 (1916) 10, 11
Overbrook Farmers Union Co-op Ass'n v. *Missouri Pac. R.R.*, 21 F.3d 360 (10th Cir. 1994) 5
Reed v. *AAACON Auto Transp., Inc.*, 637 F.2d 1302 (10th Cir. 1981) 6
Southeastern Express Co. v. *Pastime Amusement Co.*, 299 U.S. 28 (1936) 10
Swift v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842) 9
Underwriters at Lloyds of London v. *North Am. Van Lines*, 890 F.2d 1112 (10th Cir. 1989) 5, 6
United States v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979) 10
Wright v. *Chicago, Burlington & Quincy R.R.*, 223 F. Supp. 660 (N.D. Ill. 1963) 6

TABLE OF AUTHORITIES—Continued

STATUTES	Page
45 U.S.C. § 316(d)	5
49 U.S.C. § 10102(4)	2
§ 10925	11
§ 11110(a)(2)	11
§ 11110(a)(3)	11
§ 11701	11
§ 11702(a)(4)	11
§ 11711(d)	8

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Beltman North American Co., Inc. and North American Van Lines hereby oppose the petition for a writ of certiorari to review the judgment of the court of appeals in this case.

STATEMENT OF THE CASE

This case involves a married couple whose household belongings were damaged while being transported from Iowa to New York by respondents. A jury awarded the couple $28,000 in actual damages for the loss, as authorized by the Carmack Amendment to the Interstate Commerce Act of 1887. The jury also awarded $50,000 in punitive damages for breach of the implied covenant of good faith based upon federal common law. The Second Circuit reversed the district court's award of punitive dam-

ages as inconsistent with the Carmack Amendment itself. Petitioners subsequently filed the instant petition for a writ of certiorari.

1. In August 1988, petitioners Donald and Christa Cleveland moved from West Des Moines, Iowa, to Slingerlands, New York, a suburb of Albany. To transport their household goods and personal belongings, the Clevelands hired respondent North American Van Lines ("North American") and its local agent in Des Moines, respondent Beltman North American Co., Inc. ("Beltman"). Both are motor common carriers under the Interstate Commerce Act. 49 U.S.C. § 10102(4).

As is standard practice, the Clevelands and the carriers executed a shipping contract, known as a bill of lading. The Clevelands purchased protection, incorporated into the bill of lading, which provided for the repair, replacement or 100 percent reimbursement at current prices without depreciation for any goods damaged or lost during transport, up to a total recovery of $50,000. Pet. App. A4.

Beltman picked up the Clevelands' possessions on August 19, 1988. Because the driver who was scheduled to transport the goods to New York was unable to work due to family illness, the trailer containing the Clevelands' belongings was separated from its original tractor and was left in Beltman's lot in Des Moines to await another driver. When a new driver was found, the goods were loaded into a different van. *Id.* at A4-A5.

En route to New York, the moving van's fifth wheel broke through the truck's floor, which ultimately caused damage to petitioners' property. On August 30, 1988, the shipment arrived in Slingerlands, New York, several days late. At this time, the Clevelands realized that many of their belongings had been damaged. *Id.* at A5.

On September 13, 1988, the Clevelands made a timely claim for delay and actual damage to their possessions.

Later, upon noticing that additional items were missing, the Clevelands filed a supplemental claim for loss. North American promptly paid for the delay. Resolution of the damage and loss claim proceeded less smoothly. In February 1989, North American offered to settle the Clevelands' claim, and the Clevelands rejected the offer. *Id.* at A6.

2. The Clevelands filed the instant action in United States District Court for the Northern District of New York, asserting several causes of action. The district court submitted three theories of liability to the jury: (1) a claim for loss and damage to property under the Carmack Amendment, (2) a claim for negligent misrepresentation of the terms and conditions of the protection plan, and (3) a tort claim for punitive damages based on a common law theory of breach of an implied covenant of good faith and fair dealing in the handling of the petitioners' move and the processing of their loss and damage claim. *Id.* at A8. Because it was unable to determine what the standard for the tort claim should be, the court borrowed the New York standard for breach of an insurance contract, instructing the jury that it could award punitive damages if "defendants acted with such morally culpable conduct and wanton dishonesty so as to imply a criminal indifference to their civil obligations under the contract to transport [the Clevelands'] household goods." *Id.* at A9.

The jury found for North American on the negligent misrepresentation claim. However, it awarded petitioners $28,000 in compensatory damages under the Carmack Amendment claim and $50,000 in punitive damages for breach of the implied covenant of fair dealing. The district court entered a judgment confirming the jury award on March 8, 1993.

The court of appeals affirmed in part, but reversed the district court's award of punitive damages. The court stated that "it is plain that a claim for breach of the implied covenant of good faith and fair dealing cannot exist alongside the Carmack Amendment." *Id.* at A16.

REASONS WHY THE PETITION SHOULD BE DENIED

In this case, the district court took the unprecedented step of awarding punitive damages under the Carmack Amendment for a federal common law "breach of an implied covenant of good faith and fair dealing." The Second Circuit properly reversed. The issue raised by petitioners—whether the Second Circuit was correct in holding that the Carmack Amendment precludes a federal court from awarding punitive damages for a carrier's violation of a federal common law tort—does not warrant review by this Court. In urging this Court to consider the issue, petitioners cannot demonstrate that any of the traditional reasons for granting certiorari exist. The ruling below is in accord with all the circuits that have ruled on the issue, and it properly follows decisions of this Court. Moreover, the issue is not one of pressing or recurring importance. Earlier this century, the Court issued a number of decisions that delineated the nature and scope of the Carmack Amendment. Based on those opinions, more modern case law reveals no conflict regarding the Amendment's broad preemptive force that warrants the attention of this Court.

1. Petitioners argue (Pet. 24-33) that the decision below conflicts with decisions in the Fourth and Tenth Circuits. Not only is there no circuit split, but both the Fourth and Tenth Circuits hold that punitive damages are unavailable in a case such as the petitioners' that involves a claim based on damage to goods in transit.

The Fourth Circuit has squarely held that the Carmack Amendment prohibits a shipper from recovering punitive damages under the precise common law theory followed by the petitioners here. *Chandler* v. *Aero Mayflower Transit Co.*, 374 F.2d 129, 137 (4th Cir. 1967). Thus, if the instant action had been brought in the Fourth Circuit, petitioners' claim for punitive damages would have been dismissed.

To attempt to create a split with the Fourth Circuit, petitioners rely upon *Hubbard* v. *Allied Van Lines, Inc.*,

540 F.2d 1224 (4th Cir. 1976). *Hubbard* considered an action for breach of a specific duty, *viz.*, the duty of nondiscrimination imposed by the Interstate Commerce Act itself. 45 U.S.C. § 316(d). Although the court in *Hubbard* left open the possibility of punitive damages in that instance (a questionable holding in its own right), the panel expressly distinguished *Chandler* and preserved the Carmack Amendment's prohibition on punitive damages in common law actions brought against carriers arising out of injury to property. 540 F.2d at 1229. *Hubbard* by its own terms does not speak to the circumstances of the instant case.

The Tenth Circuit, in its case most applicable to the one at bar, held earlier this year that the Carmack Amendment precludes an award of punitive damages for the intentional violation of a regulated railroad's duty to maintain service on reasonable request. *Overbrook Farmers Union Co-op Ass'n* v. *Missouri Pac. R.R.*, 21 F.3d 360, 364 (10th Cir. 1994). The petitioners' suggestion that *Overbrook Farmers* somehow opens the door to punitive damage awards arises from one sentence of rhetorical dicta. After stating flatly that only compensatory damages are available, the panel underscored its result by noting that even if punitive damages were available in egregious cases, it would not award punitive damages in the case before it. *Id.* Petitioners' partial quotation from this argument in the alternative (Pet. 29-30), manifestly does not create a circuit split.

The earlier Tenth Circuit cases petitioners cite are irrelevant to the punitive damages issue in this case. In *Underwriters at Lloyds of London* v. *North American Van Lines*, 890 F.2d 1112, 1113 (10th Cir. 1989) (en banc), the court held that the Carmack Amendment preempts all state common law remedies. Nothing in that decision indicates that a shipper can obtain any legal or equitable remedies apart from those in the text of the Interstate Commerce Act itself. *Underwriters* expressly overruled the circuit's earlier decisions in *Litvak Meat Co.* v. *Baker*,

446 F.2d 329 (10th Cir. 1971), and *Reed* v. *AAACON Auto Transport, Inc.*, 637 F.2d 1302 (10th Cir. 1981). 890 F.2d at 1121. Therefore, *Litvak* and *Reed* provide no support for the petitioners' contention that a circuit split now exists.[1]

Finally, the Tenth Circuit has held that the Carmack Amendment does not preempt a state law award of reasonable attorney's fees to a shipper because such fees are "incidental" to the substance of a lawsuit. *A.T. Clayton & Co.* v. *Missouri-Kan.-Tex. R.R.*, 901 F.2d 833, 835 (10th Cir. 1990). However, the claim in *A.T. Clayton* was created by the Carmack Amendment itself, *id.* at 833, and therefore the decision does not support the proposition that the Amendment authorizes punitive awards based upon state or federal common law claims. Clearly, as the court below held, the federal common law tort applied here and the award of punitive damages are not merely incidental to a shipper's rights and remedies. These are awards that dramatically "enlarge a shipper's remedy." Pet. App. A15.[2]

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[1] In any event, *Litvak* held only that, even though the Carmack Amendment preempts state law, a shipper nevertheless can maintain a state law negligence action if it is "based exclusively on the holder of a receipt or a bill of lading issued by a common carrier, *qua* holder[.]" 446 F.2d at 337. *Reed* applied the law of the State of New Mexico to allow a shipper to recover punitive damages. 637 F.2d at 1307. Neither case is concerned with federal common law.

[2] The three district court cases petitioners cite are only minimally relevant and clearly provide no basis for this Court's review of the holding below. The court in *Drucker* v. *O'Brien's Moving & Storage Inc.*, 745 F. Supp. 616, 622-23 (D. Nev. 1990), awarded punitive damages for a federal common law violation by a shipper. The reported decision in that case, a transcript of the judge's decision from the bench, cites no authority except for two cases that describe the general nature of federal common law. Likewise, *Wright* v. *Chicago, Burlington & Quincy Railroad*, 223 F. Supp. 660, 662 (N.D. Ill. 1963), provides no analysis in awarding punitive damages for a violation of a Carmack Act provision, and there is no indication in *Wright* that the carrier even argued that the exemplary

Petitioners do not even claim that any other circuit has addressed the issue here. If, as petitioners assert, "[a] considerable number of cases are pending in district and circuit courts which turn on the resolution of the issues presented in this case" (Pet. 45), this Court should allow the lower courts to develop the case law further and to permit a conflict among the circuits to materialize (if indeed one ever does) before granting certiorari.

2. Petitioners argue (*id.* at 33-38) that the Second Circuit misapplied this Court's decisions in *Adams Express Co.* v. *Croninger*, 226 U.S. 491 (1913), and *Missouri, Kansas & Texas Railway* v. *Harris*, 234 U.S. 412 (1914). In fact, however, the decision below faithfully follows these and other precedents.

a. In the leading case of *Adams Express Co.*, this Court held that, in enacting the Carmack Amendment, Congress meant to preempt all state law and regulation concerning a carrier's liability to a shipper for the interstate shipment of property. 226 U.S. at 505-08. The decision emphasizes and relies upon Congress' intent to create a broad, uniform legal code to dispose of claims brought under a bill of lading. The Second Circuit directly applied this reasoning in concluding that neither a federal common law claim for breach of the implied covenant of good faith and fair dealing nor a corresponding punitive damages award could exist alongside the regulatory scheme set up by Congress. Pet. App. A16.

The Court in *Missouri* also recognized the Amendment's broad preemptive force, 234 U.S. at 417, 420, but nevertheless held that attorney's fees may be awarded pursuant to state statute because such fees (ten dollars in the *Missouri* case) "do[] not in anywise either enlarge or limit the responsibility of the carrier" and "only inci-

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award was improper. *Miller* v. *AAACON Auto Transport, Inc.*, 447 F. Supp. 1201, 1205 (S.D. Fla. 1978), does not award punitive damages, though it states in *dicta* that "punitive damages might be recoverable under federal common law[.]"

dentally affect[]" the federal statutory remedy. *Id.* at 420.[3] The Second Circuit found that, in sharp contrast, the new "breach of implied covenant tort" and the award of punitive damages "could have a dramatic impact on a carrier's liability and seriously enlarge a shipper's remedy." Pet. App. A15. Because new liability and punitive damages affect carrier liability to a much greater extent than do attorneys' fees for existing liabilities, the Second Circuit correctly applied *Missouri.*

b. Petitioners argue (Pet. 38-43) that even though the Carmack Amendment is so broad that it preempts state common law, it nevertheless is not powerful enough to preempt federal common law. Such reasoning turns this Court's case law on its head. In *Milwaukee* v. *Illinois and Michigan*, 451 U.S. 304 (1981), the Court held that even though the 1972 Amendments to the Federal Water Pollution Control Act preserved certain state law remedies, the Amendments nevertheless preempted a federal common law nuisance action. This Court explained that federal common law is far easier to preempt than is state law:

> In considering [preemption of state law,] we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress. . . . Such concerns are not implicated in the same fashion when the question is whether federal statutory or federal common law governs, and accordingly the same sort of evidence of a clear and manifest purpose is not required. Indeed, as noted, in cases such as the present we start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law.

451 U.S. at 316-17 (citations and quotations omitted); *see also Middlesex County Sewerage Auth.* v. *National*

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[3] Attorney's fee awards under the Amendment are now governed explicitly by 49 U.S.C. § 11711(d).

Sea Clammers Ass'n, 453 U.S. 1, 14-15 (1981) (holding that federal statutes allow no federal common law action for damage to fishing grounds caused by sewage discharge) ("In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate"). In the instant case, where the Carmack Amendment displaces all of state common law in the field of carrier liability, the Second Circuit was correct in holding that it displaced federal common law as well.

With the enactment of the Carmack Amendment, "there can be no rational doubt but that *Congress* intended to take possession of the subject." *Adams*, 226 U.S. at 505-06 (emphasis added). The express terms of the Amendment, passed in 1906, have remained in force for decades without courts grafting onto the statute a federal common law tort action for "breach of an implied covenant of good faith and fair dealing," with corresponding punitive damages. Whatever the policy merits of enacting such a federal tort in the first instance, this Court's precedents leave no doubt that the decision whether to adopt this remedy is for Congress, not courts, to make.

c. Petitioners seize upon language in *Adams* and argue that the Amendment preserves federal common law remedies. See Pet. 36. But that argument relies upon language taken out of its historical context. *Adams* pre-dated this Court's seminal decision in *Erie Railroad* v. *Tompkins*, 304 U.S. 64 (1938). When *Adams* was decided, under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1, 18-19 (1842), federal courts were allowed to develop a "general federal common law" that superseded state common law in federal suits. However, *Erie* overruled *Swift*, with the Court's celebrated statement that "[t]here is no federal general common law." 304 U.S. at 78. Thus, *Adams* dicta hardly serves as a basis for further review by this Court of a decision not to expand federal common law remedies

beyond anything heretofore recognized by any federal court.[4]

3. The Carmack Amendment effectively vindicates shippers' interests, making further judicial amendment to the Interstate Commerce Act unnecessary. Prior to 1906, it was difficult for a shipper to know where to file a claim for damage or loss that occurred during an interstate shipment. With the passage of the Amendment, the originating carrier must issue a bill of lading under which it is liable to the shipper for the full, actual loss or damage to the property. The Amendment in effect makes the originating carrier responsible for the protection of the property in its possession, with the exception of a few events beyond the carrier's control. See generally *New York, Phila. & Norfolk R.R.* v. *Peninsula Produce Exch.*, 240 U.S. 34, 37-39 (1916).

The Amendment has been interpreted broadly to provide remedies for all actual or consequential damages that a shipper suffers. For instance, *Southeastern Express Co.* v. *Pastime Amusement Co.*, 299 U.S. 28 (1936), dealt with a suit to recover damages for failure to deliver a motion picture in time to be exhibited as advertised. Though there was no damage to the film in transit, the Court held that the shipper could recover all damages from the interruption of its business. The Amendment is

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[4] The overriding policy consideration embodied in the Carmack Amendment as recognized by this Court in *Adams* was the importance of uniform remedies nationwide. *Adams Express Co.*, 226 U.S. at 506. But the federal common law that exists post-*Erie* inherently lacks uniformity because it borrows the proper legal standard from the state in which the transaction occurred, which is what the district court purported to do in this case. See *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979). Thus, the Amendment as interpreted would "destroy itself" if petitioners' federal common law theory were valid. *Adams*, 226 U.S. at 507. Accordingly, it is extremely unlikely that the Court's dictum retains any vitality after *Erie*, and, in any event, it clearly has not been followed by any other court that has addressed the issue.

"comprehensive enough to embrace all damages resulting from any failure to discharge a carrier's duty. . . ." *Id.* at 29 (quoting *Georgia, Fl. & Ala. Ry.* v. *Blish Co.*, 241 U.S. 190, 196 (1916)).

Congress has given the Interstate Commerce Commission the power to promulgate and enforce regulations pertaining to the transportation of household goods by motor common carrier. See 49 U.S.C. §§ 11110(a)(2), 11702(a)(4). These powers extend to protecting individual shippers, such as petitioners. 49 U.S.C. § 11110(a)(3). Indeed, the ICC has power to revoke or suspend the license of a carrier found to have violated its obligations under the Interstate Commerce Act as interpreted by the ICC. 49 U.S.C. §§ 10925, 11701. There is therefore no need for a court-created remedy to punish carriers found to have violated their basic duties in carrying household goods for shippers.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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APPENDIX

North American Van Lines is a subsidiary of Norfolk Southern Corporation, which has the following consolidated (more than 50% owned) subsidiaries: Agency Media Services, Inc.; Atlantic Investment Company; Lamberts Point Barge Company, Inc.; Norfolk Southern Properties, Inc.; Norfolk Southern Railway Company; North American Van Lines, Inc.; NS Crown Services, Inc.; NS Fiber Optics, Inc.; NS Transportation Brokerage Corporation; Pocahontas Development Corporation; Pocahontas Land Corporation; and TCS Leasing, Inc.

Norfolk Southern Railway Company subsidiaries include the following: Airforce Pipeline, Inc.; Alabama Great Southern Railroad Company, Atlanta and Charlotte Air Line Railway Company; Atlantic and East Carolina Railway Company; Camp Lejeune Railroad Company; Central of Georgia Railroad Company; Chesapeake Western Railway; Cincinnati, New Orleans and Texas Pacific Railway Company; Citico Realty Company; Elberton Southern Railway Company; Georgia Midland Railway Company: Georgia Southern and Florida Railway Company; High Point, Randleman, Asheboro and Southern Railroad Company; Interstate Railroad Company; Memphis and Charleston Railway Company; Mobile and Birmingham Railroad Company; Norfolk and Portsmouth Belt Line Railroad Company; Norfolk and Western Railway Company; North Carolina Midland Railroad Company; Rail Investment Company; Richmond-Washington Company; Shenandoah-Virginia Corporation; Southern Western Rail Road Company; Southern Rail Terminals, Inc.; Southern Rail Terminals of North Carolina, Inc.; Southern Railway-Carolina Division; Southern Region Coal Transport, Inc.; Southern Region Materials Supply, Inc.; Southern Region Motor Transport, Inc.; State University Railroad Company; Tennessee, Alabama & Georgia Railway Company; Tennessee Railway Company; Toledo Belt Railway Company; Virginia and Southwestern Railway Company; and Yadkin Railroad Company.

Norfolk Southern Properties, Inc. subsidiaries include the following: Alexandria-Southern Properties, Inc.; Arrowood-Southern Company; Arrowood Southern Executive Park, Inc.; Carlyle CA Corporation; Carlyle Development Corporation; Charlotte-Southern Corporation; Charlotte-Southern Hotel Corporation; Lambert's Point Docks, Incorporated; NS-Charlotte Tower Corporation; Nickel Plate Improvement Company, Inc.; Norfolk Southern Industrial Development Corp.; Sandusky Dock Corporation; Southern Region Industrial Realty, Inc.; and Virginia Holding Corporation.

Northern American Van Lines, Inc., domestic subsidiaries include the following: A Five Star Forwarding, Inc.; A Three Rivers Forwarding, Inc.; Alaska USA Van Lines, Inc.; Americas Quality Van Lines, Inc.; City Storage & Transfer, Inc.; Fleet Insurance Management, Inc.; Front-Runner Worldwide, Inc.; Great Falls North America, Inc.; NACAL, Inc.; NALOG, Inc.; NAVTRANS Container Lines, Inc.; NAVTRANS International Freight Forwarding, Inc.; NorAm Forwarding, Inc.; North American Distribution Systems, Inc.; North American Forwarding, Inc.; North American Logistics, Ltd.; North American Moving & Storage, Inc.; North American Tarnsport Insurance Co.; North American Van Lines of Texas, Inc.; and Relocation Management Systems, Inc.

North American Van Lines, Inc., foreign subsidiaries include the following: Cavalier Moving & Storage Co., Ltd.; Cold Lake Moving & Storage Ltd.; Curry Moving & Storage Ltd.; Midi-Data Speditions GmbH; NAVPAN, S.A.; NAVTRANS International Speditions GmbH; North American Van Lines Ltd.; North American Van Lines Canada Ltd.; North American Van Lines (Alberta) Ltd.; North American Van Lines (Atlantic) Ltd.; Star Storage Ltd.; Tru-Flite Transportation Systems Inc.; Westlake Moving & Storage, Ltd.; Westmont Moving & Storage, Inc.; and 153843 Canada, Inc.